U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: September 20, 1990

Case No. 89-INA-127

IN THE MATTER OF

MELILLO MAINTENANCE, INC.
Employer

on behalf of

CESAR A. FALLA-MENDEZ
Alien

Steven Weinstock, Esquire
For the Employer

Before: Brenner, Groner, Guill, Lipson, Litt, Marcellino, Romano, Silverman and Williams
Administrative Law Judges

By: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (the "Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing and qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. §656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements

have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review as contained in an Appeal File [hereinafter (AF)], and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

Melillo Maintenance, Inc., the Employer, filed an application for alien employment certification dated February 4, 1987, on behalf of Cesar A. Falla-Mendez, the Alien, for the position of Night Supervisor/Office Cleaning (AF 26). The job duties were described as:

> Supervise office cleaners who empty waste baskets, clean ashtrays, dust, vacuum, mop, clean interior windows. Make sure required workers are doing their assigned jobs. Check on quality of work and fill in where needed."

The Employer required one year experience in the job offered and verifiable reference.

The Certifying Officer (C.O.) reviewed the Employer's application and recruitment efforts and issued a Notice of Findings (NOF) dated March 31, 1988 which proposed denying certification (AF 13-14). The C.O. reviewed the Alien's statement of qualifications and noted that the Alien had worked for the Employer as an office cleaner from August, 1985 through February, 1986. In February, 1986, the Employer promoted the Alien to the position of Night Supervisor (see AF 27). Based on the statement of qualifications, the C.O. determined that the Alien did not have one year experience in the job offered when he began working in that position in February, 1986. Accordingly, the C.O. found that the Employer was not offering the position at its actual minimum requirements pursuant to 20 C.F.R. §656.21(b)(6).[1]

The Employer submitted a rebuttal statement dated May 6, 1988 (AF 6-12). It stated that "since certification is being sought for a position different from that for which the alien was hired, and since he had more than one year's experience in the position with this employer when the application was submitted in March, 1987, this experience should qualify since the employer customarily requires one year experience for the job" (AF 6). The Employer also offered, (AF 7, 9, 10) in some length, its explanation as to why it is not feasible for it to hire workers with less than one year experience.

The C.O. reviewed the rebuttal and issued a Final Determination (F.D.) dated June 21, 1988 denying certification (AF 4-5). The C.O. found no evidence that the Alien had one year of

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[1] The NOF, at the outset (AF 14), cites verbatim the provision of 20 C.F.R.656.21(b)(6), thereby offering Employer the opportunity to establish the alternative (infeasibility) qualification under this section.

supervisory experience prior to working in the job offered for the Employer. Accordingly, and for this reason alone, the C.O. found that the Employer's requirements were not its actual minimum requirements.

The Employer requested review of the C.O.'s determination in a statement received on July 13, 1988 (AF 3). By Decision and Order dated March 26, 1990, a three-judge panel of this Board (one judge dissenting) affirmed the C.O.'s denial of certification. On April 19, 1990, Employer filed a Petition for En Banc Review, which was granted by Order dated May 25, 1990.

DISCUSSION AND FINDINGS

The panel found it ". . . evident that [the alien] did not have one year of experience in the job offered when he was promoted to night supervisor in February, 1986" (D&O, at 4). We find this conclusion amply demonstrated in the record (AF 9, 26), and accordingly hereby adopt such of the panel's findings. To this extent, Employer has clearly violated 20 C.F.R.§656.21(b)(6).

The panel also entertained Employer's argument in rebuttal relative to the non-feasibility of hiring workers with less experience than that required by its job offer, and found same insufficient (D&O, at 4). The C.O., however, as already noted, never addressed such argument in the first instance (See F.D. at AF 4, 5).

While Employer urges this Board to rule upon the propriety of its argument in this regard, we decline to do so where, as here, the C.O. was entirely unresponsive to Employer's detailed rebuttal argument.

ORDER

This matter is accordingly REMANDED to the Certifying Officer for her determination in respect of Employer's non-feasibility rebuttal position, and final determination on this issue.

For the Board:

RALPH A. ROMANO
Administrative Law Judge

Melillo Maintenance, Inc., 89-INA-127
Separate Opinion by Judge LAWRENCE BRENNER, joined by Judges Guill, Lipson and Williams:

The C.O. failed to consider the Employer's reasoned rebuttal argument addressing the other prong of 20 C.F.R. §656.21(b)(6) -- that at the time of recruitment for this job it was infeasible to train a new hire who lacked the experience gained with the Employer by the previously hired Alien. In this circumstance, in fairness to employers and aliens for whom delay

in reaching issues potentially has serious consequences, we would have proceeded to decide this case on the merits now. We do agree that at the least this case should be remanded to the C.O.

LAWRENCE BRENNER
Administrative Law Judge